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No. 90-50

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ELLIS GREGORY, JR. and
ANTHONY P. NUGENT, JR., JUDGES,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, excludes appointed state judges from its coverage as "appointees on the policymaking level." 29 U.S.C. § 631(f).

(2) Whether a mandatory retirement age for elected and appointed judges violates the Equal Protection Clause of the Fourteenth Amendment.

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BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The American Association of Retired Persons (AARP) is a nonprofit organization of approximately thirty-three million persons age 50 and older. More than eleven million AARP members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, "ADEA," 29 U.S.C. § 621 *et seq.*

AARP seeks to insure that older persons are judged on their ability, not age. To this end, AARP created a Worker Equity Initiative in 1985 to study and address issues affecting the employment of older workers. AARP has developed educational and advocacy programs to en-

courage and promote the employment of older workers. As part of its advocacy efforts, AARP has filed numerous *amicus curiae* briefs in the United States Supreme Court and the United States Courts of Appeals regarding the proper interpretation and application of the ADEA to insure that the rights of older workers are fully protected.[1]

Congress enacted the ADEA to protect individuals from arbitrary age discrimination. The most arbitrary form of discrimination is mandatory retirement. Studies consistently demonstrate that chronological age is a poor determinant of ability and that capability varies greatly among individuals. The ADEA's prohibition of mandatory retirement represents a national commitment to the principle that each individual—regardless of age—has the right to remain a productive member of society and to be judged on his or her individual abilities. For these reasons, AARP opposes mandatory retirement policies such as Missouri's requirement that its judges retire upon reaching age 70.

AARP submits this brief *amicus curiae*, with the consent of the parties,[2] urging the Court to reverse the decision of the Eighth Circuit below.

STATEMENT OF THE CASE

AARP adopts the Petitioners' statement.

[1] *See, e.g., Gilmer v. Interstate Johnson Lane Corp.*, No. 90-18, *cert. granted*, 111 S. Ct. 41 (1990); *Hoffman-LaRoche, Inc. v. Sperling*, 110 S. Ct. 482 (1989); *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854 (1989); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). AARP also filed a brief *amicus curiae* arguing against the mandatory retirement of Vermont judges in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990).

[2] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Petitioners challenge the legality of Missouri's mandatory retirement provision for the majority of its state court judges. Mo. Const. art. V, § 26. Petitioners and AARP submit that compelling judges to retire at age 70 solely because of age violates the ADEA and the Equal Protection Clause.

The ADEA broadly protects state and local government employees from discriminatory practices. Section 630(f) of the ADEA excludes elected officials, and their personal staffs, their policymaking appointees, and their immediate advisers from coverage under the ADEA. Unless appointed state court judges fall within one of the categories expressly excluded by Section 630(f), they cannot be mandatorily retired.

The Eighth Circuit erroneously held that appointed judges are "appointees on the policymaking level" within the meaning of Section 630(f). This broad construction of Section 630(f) is unsupported by the statutory language and purpose of the ADEA and is contrary to pertinent legislative history of the identical exclusion from coverage in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(f). The framework of the exclusions in Section 630(f) reveals that Congress intended to identify two related groups—elected officials and a select group of their appointees. The purpose of the exclusions was to shield elected state officials from the intrusion of a federal statute in the selection of individuals with whom the officials would work closely.

Nothing in the language, the structure, or the legislative history of the exclusions from the definition of employee suggests that Congress intended to exclude appointed judges from the reach of the ADEA. Judges do not fall within the type of "appointees" identified in Section 630(f), as they do not work closely with or for their appointing authorities. Indeed, judges must main-

tain a separate and independent relationship from the executive branch.

Nor do judges make policy—the judge's role is to resolve a concrete case or controversy, not to issue an advisory opinion. The role of a judge as part of the separate and independent judiciary branch of government simply does not fit within the meaning or purpose of an elected official's "appointee on the policymaking level" as defined by Section 630(f) of the ADEA.

Compelling both appointed and elected judges to retire at age 70 also violates the Equal Protection Clause of the Fourteenth Amendment. The State has singled out an arbitrary criterion, age 70, that denies older persons the right to continued employment. The purported reasons for the mandatory provision are as arbitrary as the selection of age 70 itself. These reasons rely on outdated and unfounded stereotypes about age and ability. Such stereotypes should no longer withstand constitutional scrutiny.

Mandatory retirement has been abolished for most employees under the ADEA, as empirical evidence and public policy establish that age is simply irrelevant to ability.[3] Missouri's continued use of age to terminate healthy and competent jurists has a devastating effect on those individuals and injures society as a whole. As such, it lacks a rational basis and violates the Equal Protection Clause.

[3] The ADEA permits the mandatory retirement of law enforcement officers, 29 U.S.C. § 623(j), and of tenured faculty at age 70, 29 U.S.C. § 631(d). These temporary exceptions expire on December 31, 1993. The Act also permits the mandatory retirement of certain bona fide or high policymaking executives eligible for an immediate pension of $44,000. 29 U.S.C. § 631(c).

ARGUMENT

I. APPOINTED STATE COURT JUDGES ARE NOT "APPOINTEES ON THE POLICYMAKING LEVEL UNDER THE ADEA."

The ADEA protects "employees" from arbitrary age discrimination in employment. The Act defines "employee" to mean "an individual employed by an employer. . . ." 29 U.S.C. § 630(f). There is no dispute that Missouri is an employer subject to the proscriptions of the ADEA. 29 U.S.C. § 630(b).[4] The only issue is whether appointed state court judges are employees within the definition established by 29 U.S.C. § 630(f).[5]

The ADEA's coverage of appointed judges may be ascertained by analyzing the statutory language of the Act, pertinent legislative history, and the particular circumstances of the instant case.[6] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The exceptions to the ADEA's protections are to be narrowly construed and the class of individuals who are entitled to the law's

[4] Appendix to Petition for Writ of Certiorari, A 20.

[5] Section 11(f), 29 U.S.C. § 630(f) reads, in relevant part:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. . .

[6] The question of whether appointed state court judges fall within the exception is one of federal law, rather than state law. State law is only relevant insofar as it describes the individual's position and accompanying duties. *EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985).

protections as "employees" must be defined broadly. *EEOC v. First Catholic Slovak Ladies Assoc.*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983). Because arbitrary age limits are repugnant to the letter and spirit of the ADEA,[7] the mandate to narrowly interpret exceptions to the Act's protections is especially significant when, as here, an individual is being mandatorily retired. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 (1985).

The broad definition of "employee" under the ADEA is explicitly limited by exceptions excluding certain persons in state and local governments from the protections of the Act. The exceptions identify two groups: elected officials and those individuals who work for the elected officials. For the latter group, Congress specifically described the type of employees selected by elected officials whom it intended to exclude from the reach of the Act:

> (1) any person chosen by such officer to be on such officer's personal staff, or
>
> (2) an appointee on the policymaking level, or
>
> (3) an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f).

The plain meaning and purpose of the exclusionary provisions in Section 630(f) demonstrate that Congress intended "to exclude state and local elected officials and *certain* non-civil service appointed officials." *EEOC v. Wyoming*, 460 U.S. 226, 233 n. 5 (1983) (emphasis added).

[7] 132 Cong. Rec. 32,658 (1986).

A. Judges Are Not Appointees Within The Meaning Of ADEA Section 630(f) Since They Do Not Work For An Elected Official.

The meaning of "appointee on the policymaking level" must be understood within the context of the categories described within the exception. The categories of individuals listed in the exclusions share a common thread —their relationship to an elected official. These individuals typically "work closely with and are accountable to the official who appointed them." *EEOC v. Vermont*, 904 F.2d 794, 800 (2d Cir. 1990). The framework and context of the exclusions make this relationship essential to determining the scope and meaning of "appointee on the policymaking level."

The placement of the category of policymaking appointees between the categories of personal staff and immediate advisers strongly suggests that the exclusion of policymaking appointees is limited to individuals who have a relationship with or are accountable to the elected official. The first and third categories of employees identified in Section 630(f) clearly describe individuals who work closely with the elected official. The placement of the appointee category within this framework indicates Congress' understanding that the three categories shared common characteristics. Otherwise, Congress would not have structured the exclusions in such an interrelated manner.

The legislative history of the identical provision in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e(f), supports the interpretation of the ADEA Section 630(f) as limited to appointees accountable to their elected official.[8] Congress enacted the identi-

[8] Senator Bentsen, the chief sponsor of the ADEA amendments to include state and local government employees, pointed to the parallel amendments to Title VII in 1972 as support for amending the ADEA. 118 Cong. Rec. 15,895 (1972). ("I believe that the principles underlying these provisions in the EEOC bill [Title VII]

cal exception for appointees under Title VII when it expanded the definition of employer to include state and local governments." The exception for elected officials arose because of congressional concern that by expanding the definition of employer in the bill, the amendment would be "broad enough to cover [employees such as] Governors of States, State Supreme Court justices, state legislators, and so forth." 118 Cong. Rec. 4096 (1972) (remarks of Sen. Ervin).

The evolution of the elected officials' exception and the three related categories reveals a clear purpose for the provision—to shield an elected official and those individuals "who are in a close personal relationship and an immediate relationship with him" from the scrutiny of the federal courts. 118 Cong. Rec. 4492-93 (1972) (remarks of Sen. Williams). Senator Ervin's initial amendment to the definition of employee excluded any elected officials and those who "advise him in respect to the exercise of the constitutional or legal powers of his office." 118 Cong. Rec. 4483 (1972) (remarks of Sen. Ervin). Senator Williams also proposed to exclude the personal staff of the elected official and the language was changed to add "any person chosen by such officer to be a personal assistant." 118 Cong. Rec. 4492-93 (1972). The Senate adopted this language; it became the first and third categories of the exception in the definition of employee. 42 U.S.C. § 2000e(f).

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are directly applicable to the Age Discrimination in Employment Act." *Id.* (remarks of Sen. Bentsen). The legislative history of the identical language in Title VII is therefore relevant to the interpretation of such language in the ADEA. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *EEOC v. Ross*, 758 F.2d 581, 584 n.7 (11th Cir. 1985). The only difference between the ADEA and Title VII definitions of employee results from a 1984 amendment to the ADEA covering United States citizens employed overseas. Pub. L. No. 98-459, 98 Stat. 1767 (1984).

* Pub. L. No. 92-261, 86 Stat. 103 (1972).

Senator Javits repeatedly sought clarification and narrowing of the "adviser" phrase proposed by Senator Ervin. He expressed his concern that the phrase as written would encompass many employees who were not high level advisers:

> I realize that the Senator [Ervin] is seeking to confine it to the higher officials in a policymaking or policy advising capacity.

118 Cong. Rec. 4097 (1972) (remarks of Sen. Javits). This exchange precipitated the creation by the conference committee of the "middle category of persons excluded from the definition of employees, namely "appointees on the policymaking level." H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 2 (1972).

The addition of language identifying a select group of appointees on a policymaking level completed the categories of persons within the exclusion. This legislative history reveals a clear picture of whom Congress intended to exclude from coverage by the phrase "appointees on the policymaking level":

> those persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of state or local governments, such as cabinet officers.

H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 2, 15 (1972) (joint statement of managers); S. Conf. Rep. No. 681, 92d Cong., 2d Sess. 2, 15 (1972) (joint statement of managers) *reprinted in part in* 1972 U.S. Code Cong. & Admin. News 2179, 2180. Congress also admonished that "[t]his exemption should be construed narrowly." *Id.*

While Congress was aware that judges could be covered employees under Title VII, the legislative history reflects Congress' intent to restrict the scope of the appointees' provision with no indication that appointed judges would fall within the exception. To the contrary,

the deliberations on the exclusions of certain state and local government employees focused on the appointed staff, policymakers and advisers of elected officials in the executive branch. Nothing in the language or legislative history suggests that Congress intended to exclude every employee who was an elected official or to exclude appointed state judges.

An EEOC Opinion Letter concerning the applicability of the ADEA to state and local judges confirms the meaning and limited purpose of the excluded categories and is consistent with congressional intent. Equal Employment Opportunity Commission Opinion Letter No. 7 (April 7, 1987). The Opinion Letter describes several attributes of "appointees on the policymaking level" that are absent from the functions of an appointed state court judge. In EEOC's view,[10] Section 630(f) only applies to appointees who:

> a) have a "close personal and immediate relationship between the elected official and the appointee";
>
> b) act as "first-line advisers upon whom the elected official directly relies for advice. *See* 118 Cong. Rec. 4492-93 (1972) (remarks of Senator Williams and Senator Ervin)."
>
> c) "implement[] the day to day political policies of the elected executive or legislative body that appoints them."

Id.

An analysis of state judges' duties demonstrates that they do not fall within the exception for "appointees on the policymaking level" since they are not the type of executive "appointees" contemplated by 29 U.S.C. § 630(f). While state judges may be appointed by an elected official, any connection to the elected official essentially ceases after their appointment. Judges do not

[10] *See also EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988).

serve at the pleasure of the appointing authority. *See EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985). Judges are not advisers to the elected official. On the contrary, the role of a judge must be independent from the legislator. *See EEOC v. Massachusetts*, 858 F.2d 52, 56 (1st Cir. 1988).

B. Judges Are Not Policymakers Within The Meaning Of ADEA Section 630(f).

Even if arguendo, judges are included within the types of appointees contemplated by 29 U.S.C. § 630(f), they are not "policymakers" within the meaning of the ADEA.[11] The term "policy" within Section 630(f) logically connotes the policies of the elected official. EEOC Op. Letter No. 7.

Historically, the judiciary has been independent of and separate from both the legislative and the executive. *See Bowsher v. Synar*, 478 U.S. 714, 721-23 (1986); *Muskrat v. United States*, 219 U.S. 346, 355 (1911). This Court and the Missouri state courts have repeatedly reaffirmed the importance of maintaining the separation of powers.[12]

The separation of powers safeguards the impartiality of the adjudication process itself. *Northern Pipeline*

[11] In addition to the appointee on the policymaking level, the ADEA contains the term "policymaker" in an exception permitting the mandatory retirement of an employee in a bona fide executive or "high policymaking position" who is eligible for an immediate pension of $44,000. 29 U.S.C. § 631(c)(1). Respondent did not raise this exception below as it is inapplicable to the facts here.

[12] *Morrison v. Olson*, 487 U.S. 654 (1988); *Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976) (*per curiam*); *State ex rel. Otto v. Kansas City*, 310 Mo. 542, 572 (Mo. 1925) ("The purpose of keeping the different branches separate had its origin in the framers' interest in preserving the liberty of the people."); *In Re Pate*, 107 S.W.2d 157 (Mo. Ct. App. 1937) ("The three governmental branches are each given certain inherent powers and each must be kept separate and operate in its own particular field").

Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982). The Framers sought to maintain the independence of the judiciary by limiting the exercise of judicial power to "cases" or "controversies." *See Morrison v. Olson*, 487 U.S. 654 (1988); *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395 (1980). Courts cannot entertain non-justiciable matters, nor are they permitted to issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). Missouri courts may not render advisory opinions. *International Telephone & Telegraph Corp. v. Smith*, 687 S.W.2d 194, 195 (Mo. 1985) (*per curiam*).[13]

In short, judges do not make policy.[14] They exercise their power almost exclusively by ruling on cases. In doing so, they apply the laws written and enacted by the legislatures.[15] A court may weigh policy factors and

[13] *State ex rel. Dahl v. Lange*, 661 S.W.2d 7 (Mo. 1983); *Ellsworth Freight Lines, Inc. v. State Tax Commission of Missouri*, 651 S.W.2d 130 (Mo. 1983), *cert. denied*, 465 U.S. 1001 (1984); *City of Fenton v. Twin City Fire Insurance Co.*, 780 S.W.2d 97 (Mo. Ct. App. 1989); *Wasinger v. Labor and Industries Relations Commission*, 701 S.W.2d 793, 794 (Mo. Ct. App. 1985).

[14] *Bader Realty & Investment Co. v. St. Louis Housing Authority*, 358 Mo. 747, 754 (1949) (Court determines question of power, not policy); *Brinkmann v. Common School Dist. No. 27 of Gasconade County*, 238 S.W.2d 1, 6 (Mo. Ct. App. 1951), *aff'd* 255 S.W.2d 770 (Mo. 1953) (It is the plain duty of courts to apply the law as written by the legislature and leave to that tribunal the matter of determining questions of legislative policy).

[15] Even in those instances when, in the course of adjudicating a case, the courts must interpret a silent or ambiguous statute, they must look to the legislative history for congressional intent or defer to the executive branch's construction of the statute. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233-34 (1986). In those rare instances when courts engage in nonadjudicatory activities such as rulemaking, they must rely on Congress to confer specific rulemaking authority on them. *See Mistretta v. United States*, 488 U.S. 361, 386-87 (1989); *Hannah v. Plumer*, 380 U.S. 460 (1965).

render decisions with policy implications, but the judge's role is limited to discerning the policies set by the executive or legislature, not to develop or make policy himself.[16] While deciding novel disputes may create law, making policy is quite different.

The members of Congress who drafted and enacted the appointees' exception were clearly cognizant of the role of the judiciary in our system of government.[17] Accordingly, to assume that Congress meant to include judges within the policymaking exception of the ADEA would mean that, without explanation, Congress enacted a law which is inconsistent with the long-established independent role of the judiciary in the American government.

The court below further erred in holding that Petitioners and apparently all state judges were policymakers based on the supervisory authority of some state judges to develop rules of professional conduct or policies for the resolution of disputes within the judiciary. *Gregory v. Ashcroft*, 898 F.2d 598, 602 (8th Cir. 1990).[18] The clear purpose of the appointee exception was to limit it to high level policymakers. Judge Gregory is an associate circuit judge. J.A. 3. Judge Gregory's supervisory authority is limited to his personal staff of one, and asso-

[16] *State v. One 'Jack and Jill' Pinball Machine*, 224 S.W.2d 854 (Mo. Ct. App. 1949) (The policy of legislative enactments is not for courts but for the legislature to establish).

[17] Senator Ervin, the lead author of the appointees' exceptions in Title VII, did not view judges as policymakers since they had "no discretionary power to fashion policies based on such considerations as expediency or prudence." S. Ervin and R. Clark, *Role of the Supreme Court: Policymaker or Adjudicator*, 1 (1970).

[18] Since municipal judges (who are at the lowest level in the Missouri court hierarchy) are not subject to mandatory retirement under the state constitution, Mo. Const. art. V, § 26, it is unlikely the court below viewed them as having supervisory authority.

ciate judges cannot even vote on local rules. Mo. Const. art. V, § 15. The motivating factor underlying the Eighth Circuit's construction of Section 630(f) is its view that Congress would not have intended to exclude elected judges while not also excluding appointed judges. Yet Congress plainly made this distinction in the statute. The reason for exempting all elected officials is because they are subject to selection by the electorate through the democratic process. Elected officials are "tested at the polls," 118 Cong. Rec. 4492 (1972), and Congress did not seek to interpose the federal courts in this process. However, this reasoning and purpose are inapplicable to appointed judges.

Missouri's requirement that its judges retire upon reaching age 70 presents a pointed example of the type of arbitrary discrimination that Congress sought to prevent by amending the ADEA to abolish mandatory retirement. Nothing in the ADEA or in pertinent legislative history supports a construction of the ADEA that denies appointed judges their rights as employees to be free from mandatory retirement. This Court should give full effect to the ADEA's definition of employee, its narrow exclusions from coverage, and the general prohibition against mandatory retirement.

II. MANDATORY RETIREMENT AT AGE 70 VIOLATES THE EQUAL PROTECTION CLAUSE.

The court below erred in holding that Missouri's mandatory retirement provision does not violate the Equal Protection Clause. While a classification based on age may not be subject to strict scrutiny by a court, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*), the court's review of a mandatory retirement provision must be more than a rubber-stamp approval. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985). The court below dismissed Petitioners' claims without any record evidence and without examining whether the relationship between mandatory retirement and a qualified judiciary is "so

attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. Because the State's reasons for imposing mandatory retirement are unsubstantiated and do not achieve the asserted objective, the age classification is not rational. *See Cleburne*, 473 U.S. at 448-49.

The State's reasons for mandatory retirement are based on unfounded stereotypes about older persons. Mandatory retirement is premised on the unsupported notion that people become mentally or physically incompetent at a certain chronological age. This prejudicial stereotype often results in arbitrary discrimination against older workers.

As the Court recognized in *Cleburne*,[19] a close examination of the asserted reasons for the classification is appropriate. In this case, the court below failed to examine whether the State's reasons were supported by data or by discriminatory stereotypes.

According to the court below, the asserted goal of mandatory retirement for judges at age 70 is "maintaining a highly qualified and vigorous judiciary." 898 F.2d at 605. The court reasoned that the legislature could assume that mandatory retirement serves this goal even if empirical evidence could show that age has no bearing on performance. The court below erred in denying Peti-

[19] In *Cleburne*, the Court held that a classification based on mental retardation, while not quasi-suspect, still warranted constitutional protection. 473 U.S. at 446. The Court closely examined the reasons articulated by the city for a zoning ordinance denying a special use permit for a proposed group home for the mentally retarded. 473 U.S. at 448-50. The Court emphasized that negative attitudes or unsubstantiated fears are not permissible bases for segregating the mentally retared. 473 U.S. at 448. The Court rejected each of the reasons set forth by the city, noting that "the record does not reveal any rational basis" that the segregation of mentally retared served the city's interests. *Id.* Rather, the Court concluded that the ordinance was based on irrational prejudices against the mentally retarded. 473 U.S. at 450.

tioners the opportunity to present such evidence. Moreover, without any factual support for the classification, the court should have invalidated the provision based on the standards applied in *Cleburne*, 473 U.S. at 450.

The court below relied on reasons set forth by the Missouri Supreme Court more than twelve years ago in *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978). The reasons asserted by the state for mandatory retirement at age 70 are:

> (1) a judicial system of the highest caliber "justifies the drawing of a line at an age at which there is often a lessening in mental and physical abilities;"
>
> (2) to avoid the tedious task of determining physical and mental qualifications after a certain age;
>
> (3) to increase opportunities for the young to enter the judiciary; and
>
> (4) to assure predictability and ease in administering pension plans.

Gregory v. Ashcroft, 898 F.2d at 605 (citing *O'Neil v. Baine*, 568 S.W.2d at 766-67). These reasons are premised on prejudicial stereotypes about older persons and are not legitimately related to the mandatory retirement of judges at age 70.

Medical research flatly contradicts the first assertion of a normal decline in mental capability at age 70.[20] While the unsupported belief in an overall decline in mental functioning with age existed at the time of the decisions in *Murgia* and *O'Neil*,[21] accepted studies now

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[20] Since mental capacity, not physical ability, is the primary qualification for a judge, this section focuses on medical research involving mental processes and aging.

[21] McEvoy & Cascio, *Cumulative Evidence of the Relationship Between Employee Age and Job Performance*, 74 J. of Appl. Psych. 11 (1989).

show no decline in average intelligence at least until age 80.[22] In fact, recent research demonstrates that some intellectual functions may even improve with age.[23] According to Dr. T. Franklin, Director of the Public Health Service, Department of Health and Human Services at the National Institute of Health, "New research demonstrates that, in the absence of disease conditions, functioning in the various organ systems can be maintained at high levels into these later years [70s and 80s]."[24]

The State's reasons for mandatory retirement become suspect when viewed against the State's practice of retaining judges after age 70 "with the same powers as an active judge." Mo. Const. art. V, § 26(3). Even after reaching age 70, any retired judge may be granted senior status and retain all of the authority and receive the same compensation he did prior to reaching the mandatory retirement age. *Id.*[25] The State's willingness to continue to employ retired judges undermines the validity of its concern about the ability of older judges to perform competently.

Given the clear weight of contradictory data, the State's "outmoded notion of the relative capabilities," of judges at age 70 is irrational. *Cleburne*, 473 U.S. at 441.

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[22] Schaie, "The Seattle Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood" in *Longitudinal Studies of Adult Psychological Development* 33 (K.W. Schaie ed. 1983).

[23] Staudinger, Cornelius & Baltes, *The Aging of Intelligence: Potential and Limits*, 503 The Annals 43, 45 (1989).

[24] *The Removal Of The Age Ceiling Cap Under The Age Discrimination In Employment Act: Joint Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor and the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 99th Cong., 2d Sess. 26 (1986).

[25] In the same year as Petitioners filed this suit, Missouri enacted a provision taking away the "annual compensation, salary, and retirement compensation" of any judge who failed to retire at age 70. Mo. Rev. Stat. § 476.683 (1988).

Age simply bears no relationship to performance.[26] A line drawn at age 70 is as arbitrary and irrational as a line drawn at 40.

The second reason asserted by the State is also irrational and too attenuated to be served by mandatory retirement. The State seeks to avoid individual determinations of mental and physical disability by using age as the cut off for having to make such determinations. Yet, the State has created a mechanism for the specific purpose of providing individual determinations of a judge's fitness for office, particularly in the case of retirement and disability.[27] The State's asserted desire to avoid such individual determinations for judges at age 70 or older is inconsistent with their actual policy and practice.

The premise of this second reason is that old age is correlated to mental or physical incompetence, which the State assumes would be too burdensome to determine on an individual basis. The premise is not only unfounded, but its application results in the needless exclusion of a majority of productive and capable employees based on an assumption that a few older workers may no longer be competent. Congress has made it clear that society shall not deny employment opportunities to an individual based on generalizations or stereotypes about a group to which the individual belongs.[28] In other words, Congress has determined that public policy requires the individual-

[26] McEvoy & Cascio, *Cumulative Evidence of the Relationship Between Employee Age and Job Performance*, 74 J. of Appl. Psych. 11 (1989).

[27] The Missouri Constitution art. V, § 24 creates a commission on retirement, removal, and discipline to determine whether certain judges shall remain on the bench. Upon complaint and investigation, the commission may recommend the removal, suspension, discipline or reprimand of any judge. Mo. Const. art. V, § 24.

[28] H.R. Rep. No. 756, 99th Cong., 2d Sess. 5-6 (1986).

ized treatment of older employees, which the State seeks to avoid here.

The third premise of the mandatory retirement provision is to purportedly provide opportunities for the young. Demographic changes showing a significant decline in the number of youth entering the labor market[29] bring into question the continued legitimacy of this reason. Without an available pool of qualified candidates for the judiciary, the loss of experienced older judges may actually harm the State's objective of maintaining a highly qualified judiciary.

Finally, the State's assertion that mandatory retirement aids the administration of pension plans is so attenuated as to be arbitrary and irrational. *Cleburne*, 473 U.S. at 446. A normal retirement age at which a full pension is payable is key to pension plan administration, not a mandatory retirement age. Missouri, like most states, administers a pension plan covering a majority of its employees who cannot be mandatorily retired at age 70 because of the ADEA. Nothing in the record or in practice suggests that a mandatory retirement age makes Missouri's pension plan for its judges any easier to administer than its plan for any other group of state employees.[30]

Times have changed considerably since the days when mandatory retirement was presumed to be rational. "What was once a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential." *Cleburne*, 473 U.S. at 466

[29] W.B. Johnson & A.H. Packer, *Workforce 2000: Work and Workers for the 21st Century* (1987).

[30] If ease of administration was a legitimate concern, the State could require mandatory payout of pensions at age 70, regardless of retirement status, similar to that required for private sector employees at age 70½ by the Tax Reform Act of 1986, 26 U.S.C. § 401(a)(9)(c).

(Marshall, J., dissenting). Congress has condemned mandatory retirement as arbitrary, wasteful, and harmful to the individual and society.[31] Advances in medical science demonstrate that age is not an accurate predictor of mental or intellectual ability. These are sizeable differences between adults and the process of intellectual change. "[P]ersons of the same chronological age are not identical as to their mental status. There are 70-year-olds who function like 30-year-olds and vice versa." [32]

The time has come to more closely examine age classifications that disadvantage older workers. Congress has found that older persons continue to face widespread, arbitrary discrimination in employment based on stereotypes that are irrelevant to their abilities.[33] Just as race or gender are irrelevant to one's ability to perform, age has no relation to one's ability to perform.[34] Old age is similarly immutable, since once an individual reaches a chronological age there is obviously no turning back.[35]

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[31] "[M]andatory retirement based solely upon age is arbitrary and [] chronological age alone is a poor indicator of ability to perform a job." *See* H.R. Rep. No. 527, 95th Cong., 1st Sess. part 1, 2 (1977). "Forced retirement of people solely on the basis of chronological age is a waste, unscientific in its background, and tragic in its consequences." *Retirement Age Policies, Part I: Hearings Before the House Select Comm. on Aging*, 95th Cong., 1st Sess. 15-16 (1977) (statement of Dr. Irving Wright).

[32] Staudinger, Cornelius, & Baltes, *The Aging of Intelligence: Potential and Limits*, 503 The Annals 43, 45-46 (1989).

[33] *Working Americans: Equality At Any Age*, Staff Report of the Senate Special Comm. on Aging, 99th Cong., 2d Sess. 1 (1986). This congressional finding questions the contrary premise of *Murgia* that older persons have not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313.

[34] Wadman & Avolio, *A Meta-Analysis of Age Differences in Job Performance*, 71 J. of Appl. Psych. 33 (1986).

[35] *O'Neil v. Baine: Application of Middle-Level Scrutiny to Old Age Classifications*, 127 U. Pa. L. Rev. 798, 808 (1979); *Age Discrimination in Employment*, 50 N.Y.U.L. Rev. 924, 930 n.37 (1975); *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 UCLA L. Rev. 549, 549 n.5 (1976).

The devastating effects of mandatory retirement on the individual and society cannot be overemphasized. Mandatory retirement condemns individuals to "an idleness that hastens their decline." [36] It is "a cruel blow to the dignity and self-respect of one who has devoted his life to productive work, and takes a dramatic toll." *Rogers v. Exxon Engineering*, 404 F. Supp. 324, 329 (D.N.J. 1975). "The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression." [37] Forced retirement, not age, can be the cause of a significant decline in mental and physical ability. When individuals have the opportunity to remain active and involved, they are able to maintain and even enhance their intellectual functioning in old age.[38]

As Congress has recognized, it is difficult to reconcile the reasons for mandatory retirement with the reality of varying abilities at the same age. Indeed, Justice Oliver Wendell Holmes served with distinction on this Court into his nineties. *See* 132 Cong. Rec. 32,658 (1986) (statement of Sen. Metzenbaum). Justice Holmes' distin-

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[36] McDougal, Lasswell & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 29 U. Fla. L. Rev. 639, 642 (1976); Somers, *Social, Economic, and Health Aspects of Mandatory Retirement*, 6 J. of Health, Politics, Policy & Law 542, 547 (1981) (Studies show that the mortality rates of older persons increased after involuntary retirement).

[37] McDougal, Lasswell & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 29 U. Fla. L. Rev. 639, 641 (1976).

[38] Schaie, "The Seattle Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood" in *Longitudinal Studies of Adult Psychological Development* 33 (K.W. Schaie ed. 1983); Arbuckle, Gold, & Andres, *Cognitive Functioning of Older People in Relation to Social and Personality Variables*, 1 Psych. and Aging 55 (1986).

guished career makes a telling point—that ability, not age, is the most accurate measure of performance.

CONCLUSION

For the foregoing reasons, AARP urges the Court to reverse the decision of the Eighth Circuit. AARP respectfully requests that the Court hold that the mandatory retirement of appointed state court judges violates the ADEA and that the mandatory retirement of both elected and appointed judges violates the Equal Protection Clause.

Respectfully submitted,

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